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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1017

NATHAN AND JOANNE T. CUMMINGS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on October 31, 1974.

OPINIONS BELOW

The initial opinion of the United States Tax Court, holding in favor of Petitioners, is reported at 60 T.C. 91 (1973).

The subsequent opinion of the Tax Court, again holding in favor of Petitioners after granting Respondent's motion for reconsideration, is reported at 61 T.C. 1 (1973). The opinion of the United States Court of Appeals for the Second Circuit reversing the Tax Court is unofficially reported at 74-2 USTC ¶9799 (2d Cir. 1974). All three opinions are printed in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1974. The Court of Appeals stayed its mandate pending application to this Court for a writ of certiorari on December 6, 1974.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTIONS PRESENTED

1. Is there any legislative purpose underlying Section 16(b) of the Securities Exchange Act of 1934 that would be severely frustrated by permitting, for tax purposes, the deduction against ordinary income of a payment which under the Internal Revenue Code qualifies as a business expense?

2. Are the requirements of due process satisfied by denying taxpayer a deduction to which he is otherwise entitled, solely because of a potential but undetermined Section 16(b) violation?

3. Does the doctrine of *Arrowsmith* v. *Comm'r*, 344 U.S. 6 (1952) mandate capitalization of a payment lacking any integral relationship with prior capital transactions, and in no way representing an adjustment to any capital transaction?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution.

The statutes involved are Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), and Section 162(a) of the Internal Revenue Code of 1954, as amended. Federal jurisdiction is founded upon Section 6213(a) of the Internal Revenue Code of 1954, as amended.

These provisions are printed in Appendix B.

STATEMENT

Petitioners Nathan and Joanne T. Cummings filed a joint federal income tax return for 1962, deducting as an ordinary loss a payment of $53,870.81 made by Mr. Cummings in 1962 to Metro-Goldwyn-Mayer, Inc. ("MGM"), of which Mr. Cummings was a director. The payment was disallowed as an ordinary loss by the Commissioner of Internal Revenue, who determined that the payment should instead be a long-term capital loss. The income tax characterization of the payment is the issue in this case.

Circumstances of the Payment at Issue

On January 16, 1962, the Division of Corporation Finance of the Securities and Exchange Commission ("SEC") wrote a letter to the corporate secretary of MGM, giving its comments on the preliminary proxy solicitation material which MGM had prepared for its annual stockholders meeting to be held on February 23, 1962. The letter noted that Petitioner Nathan Cummings had purchased 3,000 shares of MGM stock during September and October of 1961, after having sold a like number within the previous six months while a director of MGM, and added:

> If he has realized any material profits from these transactions which under Section 16(b) of the Securities Exchange Act of 1934 inure to and are recoverable by the issuer, the pertinent facts with respect to these transactions should be disclosed in the proxy statement pursuant to Item 7e.

Upon receipt of the SEC letter, the secretary of MGM immediately informed Mr. Cummings of its contents. Like other persons with considerable stock holdings and investments, Mr. Cummings' stock dealings were handled by a personal financial assistant, and Mr. Cummings simply had not kept track of his pattern of stock sales and purchases. Therefore, if any Section 16(b) violation had occurred, it had been the result of inadvertence.

The problem, however, was that MGM's proxy statement had to be mailed to its shareholders promptly to comply with proxy notice requirements. Moreover, whether or not Mr. Cummings had violated Section 16(b), he did not want the proxy statement to include mention of even the potential problem, since the impact of such a statement might adversely affect his business reputation.

Accordingly, so as not to delay the issuance of MGM's proxy statement and to avoid the impact which disclosure of his *potential* Section 16(b) liability might have on his business reputation, Mr. Cummings immediately paid MGM $53,870.81. This decision was made by Mr. Cummings without legal advice, and without any recognition by Mr. Cummings that he had a legal duty to make the payment.

As a result of Mr. Cummings' payment, which was made the day after MGM received the SEC letter, MGM was able to distribute its proxy statement without any reference to the problem raised in the SEC letter.

The payment was deducted by Mr. Cummings on his 1962 tax return as an ordinary loss. The Commissioner characterized the payment as a long-term capital loss, and determined a deficiency of $45,790.18 in the Petitioners' federal income tax for 1962. A statutory notice of deficiency was issued to Petitioners, and pursuant to Section 6213 of the Internal Revenue Code of 1954, Petitioners filed their petition in the United States Tax Court.

Proceedings in the Tax Court

On April 23, 1973, the Tax Court held that the payment was properly characterized by Mr. Cummings as an ordinary and necessary business expense. In reaching this decision, the Tax Court found that Mr. Cummings' payment was motivated by valid business purposes:

> Furthermore, we find that the payment was made to protect the business reputation of the petitioner and to avoid delay in the issuance of the MGM proxy statement. The respondent suggests that the petitioner made the payment merely because he was required to do so as a matter of law and contends that the dis-

closure of an apparently innocent violation of section 16(b) would not have blemished the petitioner's business reputation. Yet, the petitioner could not control the reporting of the circumstances to the business community; and it was not unreasonable for the petitioner to believe that his business reputation, which he considered to be his most important asset, might be damaged by incomplete reporting, by people not completely understanding the circumstances, or by mere association with an alleged securities violation. In addition, the timing of the events supports the petitioner's statement as to his reasons. Immediately after learning about the problem, he agreed to make the payment to MGM, and clearly there was insufficient time for him to have secured considered legal advice as to his liability to MGM. If he had made the payment because of a belief that he was required to do so, he surely would have sought such legal advice, and more time would have been required to secure such advice and to make a decision based upon it. (Appendix A, pp. 8-9)

The Tax Court also held, consistent with its earlier decisions in *Mitchell* v. *Comm'r*, 52 T.C. 170 (1969), *rev'd* 428 F.2d 259 (6th Cir. 1970), and *Anderson* v. *Comm'r*, 56 T.C. 1370 (1971), *rev'd* 480 F.2d 1304 (7th Cir. 1973), that the doctrine of *Arrowsmith* v. *Comm'r*, 344 U.S. 6 (1952) did not require capitalization of Mr. Cummings' payment because the payment was not directly and integrally related to the earlier sales transaction.

Subsequent to the Tax Court's decision, the Seventh Circuit Court of Appeals reversed the Tax Court in *Anderson* v. *Comm'r*, 480 F.2d 1304 (7th Cir. 1973).

On July 5, 1973, the government moved for a reconsideration and revision of the Tax Court's opinion, on the theory that the Seventh Circuit's discussion of the *Arrow-*

smith doctrine warranted reconsideration of that issue by the Tax Court.

On October 2, 1973, the Tax Court reaffirmed its April 23, 1973 opinion, and again held that Mr. Cummings' payment was deductible. (61 T.C. 1) In its reaffirming opinion, the Tax Court carefully considered the Seventh Circuit's *Anderson* decision, and concluded on several grounds that the decision should not be followed in this case. First, the Tax Court noted that the Seventh Circuit appeared to have assumed in *Anderson* that there was a violation of Section 16(b) and that the payment was made in satisfaction of a liability resulting from such violation. But the Tax Court noted that:

> However, in *Anderson,* and also in the case before us today, there has been no determination that the taxpayer violated section 16(b) or that he was liable under that section to make any payment. As we pointed out before, Mr. Cummings made the payment promptly after learning of the position taken by the Securities Exchange Commission (SEC); he acted without legal advice; and these circumstances indicate clearly that the payment was not made because of a recognition of a legal duty to do so. On the contrary, it is clear that the payment was made for business reasons and for reasons growing out of his responsibility as a director of MGM. (Appendix A, p. 13)

Second, the Tax Court concluded that the Seventh Circuit had misapplied the *Tank Truck Rentals* doctrine (356 U.S. 30 (1958)) in holding that deductibility of the payment in *Anderson* would severely frustrate the purpose of Section 16(b). Since there was no Section 16(b) violation in Mr. Cummings' case, the Tax Court noted that a *Tank Truck Rentals* approach did not make sense.

Finally, the Tax Court determined that there was no integral relationship between Mr. Cummings' payment and his 1961 stock sale that would render the *Arrowsmith* doctrine applicable:

> Had Mr. Cummings made the payment to MGM in the same year as the sale and purchase, there would have been no reason to require that the payment be offset against the gain realized on the sale. When he sold his MGM stock, he sold a capital asset and realized a capital gain. The subsequent purchase of other MGM stock for a lower price does not, as a matter of tax law, provide a basis for reducing or offsetting the capital gain already realized. (Appendix A, p. 13)

Proceedings in the Second Circuit

On October 31, 1974, the Second Circuit entered judgment reversing the Tax Court on the grounds that:

(1) The legislative purpose of Section 16(b) would be severely and directly frustrated by permitting deductibility of an insider's profit repayment; and

(2) The *Arrowsmith* doctrine mandated capitalization of the payment, since it had its genesis in prior capital stock transactions.

On December 6, 1974, the Second Circuit granted Petitioners' motion to stay its mandate pending application to this Court for a writ of certiorari.

On January 27, 1975, Justice Marshall granted Petitioners' motion for an extension of time to file application for a writ of certiorari from January 29, 1975 to February 15, 1975.

REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit should be reviewed for the following reasons:

1. By denying Petitioners' deductibility on the ground of what was perceived to be the "sharply defined public policy" of Section 16(b), the Second Circuit has reached a result contrary to the decisions of this Court in *Tank Truck Rentals* v. *Comm'r*, 356 U.S. 30 (1958), and *Comm'r* v. *Tellier*, 383 U.S. 687 (1966).

Alternatively, if the decision of the Second Circuit is not so in conflict, it presents issues of far-reaching importance not yet decided by this Court concerning (i) whether there is any legislative policy underlying Section 16(b) that would require denial of an otherwise deductible item of income under the Internal Revenue Code, (ii) whether such a policy could constitutionally be applied in a situation where there has never been any determination of Section 16(b) liability, and (iii) the extent to which the Internal Revenue Code should be used to promote general considerations of equity, or as an instrument in furtherance of the policies of other federal statutes.

2. In determining that a payment unrelated in any income tax sense to a prior capital transaction must nevertheless be capitalized, the Second Circuit's opinion is in conflict with the decision of this Court in *Arrowsmith* v. *Comm'r*, 344 U.S. 6 (1952), *United States* v. *Skelly Oil Co.*, 394 U.S. 678 (1969), and *Lewyt Corp.* v. *Comm'r*, 349 U.S. 237 (1955).

There Is No Legislative Policy Mandating Capitalization of Section 16(b) Payments

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), seeks to deter short-swing stock speculation by corporate insiders who have information not available to the general public. Insiders are defined as officers, directors, and beneficial owners of more than 10% of the stock of the corporation.

Section 16(b) is at least facially simple. If an insider has made a purchase and a sale of his corporation's stock within any six-month period, the difference between the purchase price and sale price is deemed to be an indebtedness to the corporation, recoverable either by the corporation or on its behalf by any stockholder if the corporation fails to press its claim against the insider.

Section 16(b) applies regardless of the insider's intent to speculate, and proof of actual abuse of inside information has been uniformly held to be irrelevant. *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595, 93 S.Ct. 1736 (1973); *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 425 (1972).

The statute was drafted in this fashion because, as this Court has noted, "the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 422 (1972).

This means, of course, that innocent and unwary insiders are caught by Section 16(b) along with those who have abused their insider positions. But because of the draconian

effect of Section 16(b), this Court has held that care must be taken that the statute is not extended beyond its intended reach—the prevention of short-swing profits based upon access to inside information. *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 93 S. Ct. 1736, 1744-45 (1973).

The Second Circuit in this case held that the legislative purpose of Section 16(b) would be directly and severely frustrated if Mr. Cummings were permitted to deduct his payment as a business expense, on the ground that a deduction would leave Mr. Cummings with a net economic benefit from his insider trading:

> In this case, for example, Cummings would benefit by $45,790.18 if he were permitted to deduct his repayment as a business expense, although (assuming he elected the 25% alternate capital gains tax) he paid taxes of only $13,467.70 when he reported the comparable gain in 1961. Thus, he seeks to profit by $32,322.48 as a result of his §16(b) transaction. (Appendix A, pp. 23-24)

The Second Circuit was not particularly troubled by the problem that no determination of Mr. Cummings' Section 16(b) liability had ever been made. Indeed, the Court went so far as to note that "we need not conclusively determine that Cummings violated or intended to violate Section 16(b) in order to deny him an ordinary and necessary business deduction." (Appendix A, p. 25)

With due respect to the Second Circuit, this approach is an unprecedented distortion of federal income tax law in pursuit of a misguided notion of the requirements of Section 16(b), and in violation of decisions of this Court.

In the first place, there is the obvious anomaly of applying the putative purpose of Section 16(b) to a situa-

tion where there has been no determination or admission of Section 16(b) liability. Petitioners submit that, to deny deductibility on the basis that Mr. Cummings *might* have violated Section 16(b), is an unconstitutional denial of due process.

Even if Section 16(b) liability is assumed, there is no justification for denying deductibility on public policy grounds. This Court, in *Tank Truck Rentals* v. *Comm'r*, 356 U.S. 30 (1958), and in *Comm'r* v. *Tellier*, 383 U.S. 687 (1966), has held that denial of income tax deductions on public policy grounds is restricted to those few instances in which deductibility would conflict with sharply defined public policy. Any other result would, in the words of this Court, "distort the income tax laws to serve a purpose for which they were neither intended nor designed by Congress." *Comm'r* v. *Tellier*, 383 U.S. 687, 695 (1966).

The result reached by the Second Circuit in this case is just as much a distortion of the income tax laws. The Internal Revenue Service itself has recognized that Section 16(b) is not penal in nature, and that there is no sharply defined public policy prohibiting deductibility of Section 16(b) repayments. *Rev. Rul.* 61-115, 1961 Cum. Bull. 46, 48.

Absent a *Tank Truck Rentals* situation, there is no justification for using the Internal Revenue Code as an instrument of social policy, to promote what the Second Circuit believes is the legislative intent of Section 16(b). It is for Congress—not the courts— to decide if appropriate legislation is necessary to harmonize Section 16(b) of the Securities Exchange Act and Section 162(a) of the Internal Revenue Code. In fact, Congress in 1969 thoroughly considered the deductibility of fines and penalties in its delib-

erations on the Tax Reform Act of 1969. As a result, the Tax Reform Act added Sections 162(c), 162(f), and 162(g) to the Internal Revenue Code, denying deductibility for illegal bribes, kickbacks, and other payments (§162(c)), for any fine or similar payment paid to a government for the violation of any law (§162(f)), or for two-thirds of any payment by a taxpayer criminally convicted of violating the antitrust laws (§162(g)).

At the time that the deductibility of these types of payments was under consideration by Congress, the Tax Court's decisions upholding deductibility of Section 16(b) payments had not yet been questioned by any appellate court. And, yet, Congress did not see fit to legislate nondeductibility for Section 16(b) payments as it did for bribes, kickbacks, fines, penalties, and criminal antitrust damages. Neither should the courts.

The Second Circuit's Decision Is in Conflict with This Court's Decisions in the Arrowsmith, Skelly Oil, and Lewyt Cases

The Arrowsmith Doctrine

In reversing the Tax Court, the Second Circuit held that the doctrine enunciated by this Court in *Arrowsmith* v. *Comm'r*, 344 U.S. 6 (1952) mandates capitalization of the payment at issue in that the payment had its genesis in prior capital transactions. This result is a misinterpretation of the *Arrowsmith* doctrine, and should not be permitted to stand.

In *Arrowsmith* v. *Comm'r*, 344 U.S. 6 (1952), stockholders who had been required to return amounts reported in earlier years as long-term capital gain on the liquidation of a corporation were required to treat the repayments as a long-

term capital loss rather than a deduction against ordinary income.

It was conceded by taxpayers that, had the repayments occurred in the same year as their capital gains, the repayments would have been properly treated as capital losses, since the repayments were directly and integrally related to taxpayers' capital transactions. (344 U.S. at 8) Taxpayers' argument was that the repayments should be ordinary business losses for the year in which the repayments were actually made because of the principle that each taxable year is a separate unit for tax accounting purposes. The Supreme Court held, however, that the annual tax accounting principle was not breached by referring to the prior capital transactions in order to classify the subsequent repayment for tax purposes. (344 U.S. at 8-9)

Properly construed, *Arrowsmith* stands for no broader proposition than the concept that an item may be classified for tax purposes by reference to a prior capital transaction, *if* the item is so directly and integrally related to the capital transaction that it would have been an adjustment to the gain or loss if it had occurred in the same taxable year. *Arrowsmith* does not provide the integral relationship; it builds on the premise that such a relationship exists.

The relationship which the Second Circuit perceived in this case was in terms of a simple "but for" proposition—Mr. Cummings would never have made the payment if he had not had a sale and subsequent repurchase of MGM stock within six months. While this is factually correct, it is not the existence of a "but for" relationship that meets the *Arrowsmith* test. Rather, the payment must be so directly and integrally related to earlier capital transactions as to be capital in nature itself.

In this respect, the Second Circuit's error, and misapplication of *Arrowsmith,* is apparent. The Second Circuit incorrectly stated that Mr. Cummings' payment, which was measured by the price difference between his sale price and subsequent repurchase price, was an adjustment to the amount of the capital gain that he reported on his sale price. In reality, the payment had no relationship at all to Mr. Cummings' capital gain on his MGM stock sale. Mr. Cummings could have sold his MGM stock at a loss; yet, if he subsequently purchased MGM stock at a still lower price, he would be deemed to have realized an insider's "profit" under Section 16(b). But this insider's profit is wholly artificial for income tax purposes, and bears no relationship to the tax gain or loss on the stock transactions giving rise to the Section 16(b) liability.

The Tax Benefit Doctrine

The Second Circuit's decision is also in conflict with this Court's decision in *United States* v. *Skelly Oil Co.,* 394 U.S. 678 (1969), in holding that Mr. Cummings would obtain a windfall "like that condemned in *Skelly Oil* if we were to treat his §16(b) repayment as an ordinary and necessary business expense." (Appendix A, p. 22)

The tax windfall condemned in *Skelly Oil* was a deduction which the taxpayer sought for returning to customers receipts which had only been partially taxed because of the oil depletion allowance. By contrast, Mr. Cummings' payment was not a return of the capital gain on his MGM stock sale, but an artificial Section 16(b) profit measured by the difference between the sale price and subsequent purchase price.

To the Second Circuit, the problem was not that the payment represented a return of income which had been only partially taxed, since this was clearly not the case, but that the intent of Section 16(b) was to place Mr. Cummings economically in the same position that he was in prior to the stock transactions:

> The §16(b) repayment was designed, so far as practicable, to restore the status quo prior to the offending sale and purchase. We would be remiss, therefore, if we allowed Cummings a windfall which would flow from permitting his gain to be taxed at a lower capital gains rate and his repayment—designed to erase the improper § 16(b) gains—to be deducted at the more favorable ordinary income rate. (Appendix A, pp. 22-23)

This is not an application of the *Skelly Oil* tax benefit doctrine; it is a resort to the concept that the intended effect of Section 16(b) would be subverted if a deduction for Mr. Cummings' payment is allowed. As a matter of *tax law*, equitable considerations of this type have no place, as this Court held in *Lewyt Corp.* v. *Comm'r*, 349 U.S. 237, 240 (1955):

> But the rule that general equitable considerations do not control the measure of deductions or tax benefits cuts both ways. It is as applicable to the Government as to the taxpayer. Congress may be strict or lavish in its allowance of deductions or tax benefits. The formula it writes may be arbitrary and harsh in its applications. But where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer though they represent an unexpected windfall. *See Bullen* v. *Wisconsin*, 240 U.S. 625, 630 (349 U.S. at 240).

CONCLUSION

The Second Circuit's decision, which invokes the Internal Revenue Code to enforce the policy of the Securities Exchange Act of 1934, is in direct conflict with this Court's decisions, and is an extreme departure from settled law, of such importance as to warrant review by this Court.

Petitioners' application for a writ of certiorari should be granted.

Respectfully submitted,

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